

UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re)	Case No. 03-00674 (RJF)
)	Chapter 7
HIRAM LEONG FONG and ELLYN)	
LO FONG,)	
)	
Debtors.)	
_____)	Adv. Pro. No. 03-90040
)	
WAMCO XXVIII, LTD., a Texas)	
limited partnership,)	Hearing date: April 12, 2004
)	Hearing time: 9:30 a.m.
Plaintiff,)	Judge: Hon. Robert J. Faris
)	
vs.)	
)	
HIRAM L. FONG, et al.,)	
)	
Defendants.)	Re: Docket No. 89 and 95
_____)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON WAMCO XXVIII, LTD.'S MOTION
FOR SUMMARY JUDGMENT AND THE CHAPTER 7
TRUSTEE'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff WAMCO XXVIII, LTD.'S ("WAMCO") Motion for Summary Judgment filed March 8, 2004, and the Chapter 7 Trustee's Cross-motion for Summary Judgment filed March 15, 2004, both came on for hearing on April 12, 2004, before the Honorable Robert J. Faris.

Defendants Hiram and Ellyn Fong, and the related Fong family trusts were represented by Harrison P. Chung, Esq., defendant Finance Enterprises, Ltd. was represented by Sam Yee, Esq., the Chapter 7 Trustee was represented by Jerrold K. Guben, Esq., and WAMCO was represented by Hal Schofield, Esq.

Upon consideration of the memoranda, the oral arguments made in Court, and the records and files herein, and for the reasons stated in open court, the court finds that there is no genuine issue as to any of the following facts, and makes the following conclusions of law.

FINDINGS OF FACT

1. WAMCO is a Texas limited partnership. Hiram L. Fong and Ellyn Lo Fong are the debtors in this chapter 7 case and are settlors, trustees, and/or beneficiaries of their own and each other's trusts.

2. On April 15, 1997, defendants Hiram L. Fong and Ellyn Lo Fong, and the defendant Fong family trusts (collectively the "Fong group"), executed and delivered a Reference Rate Related Note (the "Note") in the principal amount of \$450,882.93 to and in favor of the Bank of America.

3. Also on that same date, for the purpose of securing the Note, the Fong group executed and delivered a Pledge of Stock and Security Agreement (the "Pledge Agreement") to and in favor of the Bank of America whereby the

Fong group pledged (a) 42 shares of common stock of Market City, Limited, represented by certificate #307, (b) 265 shares of common stock of Finance Enterprises, Ltd., represented by certificate #284, and (c) 264 shares of common stock of Finance Enterprises, Ltd., represented by certificate #286 (collectively the “Shares”). The Fong group also executed and delivered to Bank of America the original stock certificates and Irrevocable Assignments Separate from Certificate (collectively the “Certificates”).

4. Bank of America subsequently lost the Certificates. At the time the Certificates were lost, Bank of America was in possession of the Certificates. The loss of possession was not the result of a transfer by the Bank of America or a seizure, and the Bank of America could not obtain possession because the whereabouts of the Certificates could not be determined.

5. In September, 2000, the Fong group defaulted under the Note and the Pledge Agreement.

6. Bank of America assigned the Note, Pledge Agreement, and Certificates to WAMCO on October 27, 2000 and December 27, 2000, for value.

7. The Certificates were never returned to the Fong group and the Fong group does not have possession of the Certificates.

8. WAMCO never had possession of the Certificates.

9. Pursuant to this Court's Amended Order Granting Trustee's Motion to Sell Market City, Ltd. Stock entered December 30, 2003, the 42 shares of common stock of Market City, Limited mentioned herein were sold to Hiram Leong Fong, Sr., for \$2,600.00 per share.

Based upon the above FINDINGS OF FACT, the Court hereby enters the following CONCLUSIONS OF LAW:

1. The court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding.
2. The Shares are "certificated securities" in "registered form" within the meaning of Hawaii Rev. Stat. § 490:8-102(a) and are "investment property" within the meaning of Hawaii Rev. Stat. § 490:9-102.
3. The Irrevocable Assignments Separate from Certificate constitute valid "indorsement[s]" of the Certificates pursuant to HRS 490:8-102(a).
4. Bank of America had "control" of the Shares within the meaning of Hawaii Rev. Stat. §§ 490:9-106(a) and 490:8-106(b) because the Fong group duly endorsed the Certificates in favor of Bank of America. Therefore, Bank of America perfected its security interest in the Shares by "control" pursuant to Hawaii Rev. Stat. §490:9-314(a).

5. Pursuant to HRS 490:9-314(c), a security interest in investment property that is perfected by control under HRS 490:9-106 remains perfected until the secured party does not have control and the debtor has or acquires possession of the security certificates. Because Bank of America perfected by control, and because the debtors never regained possession of the Certificates, Bank of America's security interest in the Shares continues to be perfected, and no additional action need be taken to perfect its security interest under the Pledge Agreement.

6. Bank of America also perfected its security interest in the Shares by "delivery" pursuant to Hawaii Rev. Stat. § 490:9-313(a). Bank of America took "delivery" of the Shares within the meaning of Hawaii Rev. Stat. § 490:8-301(a) when it acquired possession of the Certificates. A security interest that is perfected by delivery remains perfected until the debtor obtains possession of the security certificate. Hawaii Rev. Stat. § 490:9-313(e). Because the Fong group never regained possession of the Certificates, Bank of America's security interest in the Shares remains perfected.

7. The assignment of the Note, Pledge Agreement, and Certificates from Bank of America to WAMCO does not affect the perfected status of the security interest in the Shares. The assignee of a security interest steps into

the shoes of the original secured party and is not required to reperfect the assigned security interest. WAMCO, as the Bank of America's assignee, is not required to take any further action to perfect its interests.

8. WAMCO asks for an injunction requiring defendants Hiram and/or Ellyn Fong "to cause the reissuance of replacement certificates [representing the Shares] . . . so as to obviate the necessity of an indemnity bond." (This request is moot insofar as the Market City stock is concerned because that stock has already been sold.) WAMCO argues that the Fongs have a contractual obligation (under the Pledge Agreement) to assist WAMCO in obtaining replacement certificates and that they are well positioned to fulfill that obligation because they are "major officer[s] and director[s]" of the issuing corporations. Finance Enterprises, Ltd., opposes this request, insisting that WAMCO must comply with Hawaii Rev. Stat. § 490:8-405(a):

If an owner of a certificated security, whether in registered or bearer form, claims that the certificate has been lost, destroyed, or wrongfully taken, the issuer shall issue a new certificate if the owner:

- (1) So requests before the issuer has notice that the certificate has been acquired by a protected purchaser;
- (2) Files with the issuer a sufficient indemnity bond; and

- (3) Satisfies other reasonable requirements imposed by the issuer.

The injunction requested by WAMCO would require the Fongs to perform their contractual duty to WAMCO even if doing so would breach their fiduciary duties to Finance Enterprises. It would not be appropriate to grant an injunction which would place the Fongs in such a position. (The motion does not request, and the court does not make, any determinations about the application of section 490:8-405 of the facts of this case, including the amount of an indemnity bond, if any, that would be sufficient and whether any other requirements imposed by the issuer are “reasonable.”)

DATED: Honolulu, Hawaii, May 12, 2004.



/s/ Robert J. Faris
United States Bankruptcy Judge